

February 25, 2002

## UTILIZATION OF TITLE 38 EMPLOYEES

**1. PURPOSE:** This Veterans Health Administration (VHA) Directive contains guidance on the assignment of non-patient care duties to Title 38 employees and when placement of Title 38 employees in competitive civil service positions is required; it establishes procedures for on-going review of these assignments; and it provides information on the conversion of Title 38 employees to appointments under Title 5 United States Code (U.S.C.).

**2. BACKGROUND:** A number of years ago, the Office of Inspector General found a number of Title 38 health care practitioners were serving in positions that did not require the knowledge, skills, or abilities of a health care professional. It has also come to the attention of officials in the Department of Veterans Affairs (VA) Central Office that employees in traditional Title 38 assignments are treated differently for appointment purposes. Most are being appointed under Title 38; however, others in the same types of assignments are being appointed under Title 5. This directive is being reissued to emphasize the VHA policy that Title 38 employees are to be appropriately utilized.

**3. POLICY:** It is VHA policy that responsible officials assign Title 38 employees duties requiring clinical skills; that the utilization of Title 38 employees in competitive civil service positions is prohibited; and that positions which do not require clinical skills be placed in the competitive civil service.

### 4. ACTION

a. Network Directors, facility Directors, and officials in VA Central Office are responsible for:

(1) Ensuring that positions that require clinical knowledge, skills, and abilities of an occupation covered by Title 38 are not placed under Title 5.

(2) Ensuring that positions that do not require the knowledge, skills and abilities of a health care professional are not removed from the competitive civil service by placing a Title 38 employee in the position. **NOTE:** *Such actions are contrary to Title 5 U.S.C. § 3302 and Title 5 Code of Federal Regulations (CFR), Part 1 (Civil Service Rule 1), and, in certain instances, are considered a prohibited personnel practice as defined by Title 5 U.S.C. § 2302(b)(6).*

(3) Controlling the degree to which Title 38 employees are assigned duties that do not require clinical skills. However, when such action is necessary, these officials must ensure that:

(a) Staffing is sufficient to provide patient care, continuous quality improvement, health care education, research, etc.

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(b) The assignment of the non-clinical duties is consistent with good position management principles. The provision of administrative support services needs to be evaluated in a comprehensive manner at the organization and position levels. For example, would putting employees performing related non-clinical duties under the control of clinical managers result in improved services? Positions can also be reengineered so non-clinical responsibilities can be assigned to competitive service employees, making more clinical staff available for patient care services. Positions that involve a mixture of clinical and non-clinical duties are to be evaluated to determine if Title 38 employees might be used on a part-time, consultative, collateral or rotational basis. Also, non-clinical duties assigned to Title 38 employees are to be reduced to a minimum and assigned to Title 5 employees.

(c) Staffing patterns are established so that Title 38 employees are not routinely required to perform administrative or support functions that do not require the services of a health care professional. This includes Title 38 employees assigned to evening, night, weekend, and holiday tours of duty.

(4) Working with the Chief of Staff, Nurse Executive, Chief of Human Resources, and other appropriate officials to apply the policies in this directive consistently throughout the organization. This includes reviewing and bringing into conformance appointments or assignments inconsistent with this directive.

(5) Converting positions that do not require clinical skills to the competitive civil service, and either reassigning the incumbent Title 38 employee or offering the employee the opportunity to voluntarily convert to the competitive civil service using the Interchange Agreement in VA Manual MP-5, Part I, Chapter 300, Appendix B. However, such conversion actions must be based upon a Professional Standards Board finding that the position does not require the services of a health care professional. Employees requesting conversion must be advised, in writing, of the implications of the decision on their pay and benefits (e.g., differences in leave accrual rates and, since conversion is voluntary, these employees would not be eligible for pay retention). In addition, new, current, or converting Title 5 employees who are licensed in a Title 38 occupation (e.g., M.D., R.N.) are to be advised in writing that they are prohibited from engaging in professional practice in their VA position. Copies of these statements are to be placed on the left-hand side of the employee's Merged Records Personnel Folder. When employees are reassigned to patient care positions, management must ensure that the employee's competencies and credentials (e.g., license) are current. Reasonable measures must also be taken to reduce or eliminate potential adverse effects on employees being reassigned. There may be labor relations responsibilities to fulfill when an employee is involuntarily reassigned from one bargaining unit position to another. Managers are to consult with their labor relations advisor to determine whether an obligation exists. ***Note:** If the Professional Standards Board finds the position requires a Title 38 employee, responsible officials are to evaluate the position to ensure it is consistent with the criteria in preceding subparagraphs a(1) and a(2).*

b. Network Directors, facility Directors, and officials in VHA Central Office **can not**:

(1) Assign Title 5 employees, or former Title 38 employees who have converted to Title 5 positions, any clinical responsibilities associated with a Title 38 occupation. Such responsibilities can only be assigned to employees appointed under Title 38.

(2) Convert Title 38 employees to Title 5 positions to avoid pay limitations, required waivers of qualification standards, competitive civil service procedures, credentialing requirements, or to circumvent provider-patient ratios.

(3) Establish Title 5 positions in the occupations listed in 38 U.S.C. 7401(1) or (3).

## **5. REFERENCES**

- a. Title 38 U.S.C. § 7304.
- b. Title 5 U.S.C. § 2302 (b)(6) and § 3302.
- c. Title 5 CFR, Part 1 (CS Rule 1).
- d. Title 5 CFR, Part 315 § 315.701 and Part 316 § 316.702.
- e. VA Manual MP-5, Part I, Chapter 300, Appendix B.

**6. FOLLOW-UP RESPONSIBILITY:** The Director, Management Support Office (10A2), is responsible for the contents of this Directive.

**7. RESCISSIONS:** VHA Directive 2000-045, dated November 16, 2000, is rescinded. This VHA Directive expires February 28, 2007.

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